RECENT BOOKS ON INTERNATIONAL LAW
EDITED BY RICHARD B. BILDER

BOOK REVIEWS


Criminal law theorists have long been preoccupied with the purpose of punishment. Virtually every introductory text in criminal law begins by asking why a society may deliberately and justifiably inflict pain on human beings and by then canvassing familiar consequentialist and retributivist answers. So it is perhaps surprising that only recently, more than half a century after Nuremberg, have lawyers started to think seriously about the special problem of punishment in international criminal law (ICL). One reason for this neglect, I suspect, lies in the sheer gravity of, and intuitive revulsion to, ICL crimes. Acts of genocide, crimes against humanity, and war crimes make the question “why punish?” seem pejoratively academic. “It may well be essential to hang Göring,” Hannah Arendt famously wrote in a letter to Karl Jaspers, “but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.”

Such an “answer,” however, no longer suffices, if it ever did. In the last two decades, ICL institutions have proliferated, and a nascent international criminal justice system has emerged—however embryonic, frequently dysfunctional, disorganized, and arguably, at times, even counterproductive to its putative goals. International criminal law, like its national analogue, inflicts “hard treatment” on offenders; it purports to have that right and—some would say—obligation. So while Arendt is surely right that punishment can never suffice to address mass atrocity, that observation does not absolve international lawyers of the professional obligation to consider how, why, under what circumstances, and to what extent we may justifiably punish the perpetrators of ICL crimes. If anything, her observation makes these questions more pressing.

In part for this reason, Atrocity, Punishment, and International Law is a welcome and original contribution to the literature. While much of the scholarship on transitional justice shares Mark Drumbl’s trenchant—and, in my view, largely accurate—critique of the one-size-fits-all ICL response to mass atrocity, Drumbl, professor of law and director of the Transnational Law Institute at Washington and Lee University, is the first to write a comprehensive study that reexamines the multitude of issues that have crystallized since the ICL renaissance in the post–Cold War era. Marked by prodigious research and rigorous interdisciplinary analysis, the book critiques the liberal paradigm of ICL, particularly as implemented by international institutions, as a default response to mass atrocity. It also scrutinizes the rhetorical bromides and empirically dubious assumptions about ICL’s uniform desirability, legitimacy, and efficacy in diverse circumstances.

The originality of Drumbl’s work, however, does not lie principally in its critical dimensions. Unlike cynics who contentedly note the shortcomings of ICL but stop there, Drumbl proposes

1 As quoted in GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 13 (2000).

reforms. He recognizes that his proposals may not work and that more empirical evidence and experimentation will be needed; he wants only to “begin a conversation” (p. 181). Still, he makes a powerful case for revising prevailing assumptions about the shape that ICL can or should take in diverse circumstances of mass atrocity. And he challenges the tacit presumption of the liberal ICL paradigm: that what works—or supposedly works—in the national legal sphere for “ordinary” crimes perpetrated by individuals in the context of a reasonably well-ordered polity can be readily transposed to the international legal sphere of “extraordinary” crimes perpetrated, in a sense, by collective entities in the context of mass atrocity.

“How do we, and how should we, punish someone who commits genocide, crimes against humanity, or discrimination-based war crimes? These questions—the former descriptive, the latter normative—are the focus of this book” (p. xi). I disagree at the margins with some of Drumbl’s answers to these questions, and I tend to be somewhat more optimistic about ICL’s long-term transformative potential and value. But we agree, with some differences in emphasis, that the conventional rationales for punishment cannot be unreflectively transposed to ICL and that, of these rationales, expressive goals (broadly understood) seem the most plausible and productive. Yet the questions identified by Drumbl at the outset do not precisely or fully capture his actual project. In fact, my principal criticism of Atrocity, Punishment, and International Law is that it sometimes conflates the above questions—about the descriptive and normative dimensions of ICL punishment—with other equally, if not more, important ones about the appropriate shape of transitional justice writ large. This conflation obscures distinctions that would clarify and perhaps bolster Drumbl’s central thesis: that the predilection for exogenously imposed prosecutions that conform to the liberal paradigm of criminal justice inhibits the emergence of heterogeneous, indigenous responses to mass atrocity that may be more appropriate, more accurate, or more effective.

To his credit, the nuance of Drumbl’s oft qualified critique of ICL cannot be adequately captured in a brief review. But the essential structure of his argument runs roughly as follows. It is an article of faith among some scholars, politicians, and human rights advocates that what may be characterized broadly as the Western liberal model of criminal justice can and should be transposed from the realm of ordinary crime in a national legal system to that of extraordinary crime—genocide, crimes against humanity, and war crimes—in the international legal system. ICL presumes, that is, that the principles of national criminal justice systems, applied primarily to crimes perpetrated by individuals in a reasonably well-functioning polity, can be applied to mass atrocities perpetrated either by brutal autocratic regimes or by collectives operating within circumstances of war, ethnic conflict, or other conditions characterized by the collapse of minimum order. Extraordinary crime, as conceived by Drumbl, means “conduct—planned, systematized, and organized—that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target on discriminatory grounds” (p. 4). Of course, as the Nuremberg tribunal famously said, men, not states, commit crimes. But in a more holistic sense—that is, if we move from the narrow rubric of individual criminal liability, strictly conceived, to broader issues of moral responsibility, psychology, and sociology—both the victims and the perpetrators of extraordinary crime may be characterized as collectives: ethnic, national, religious, racial, martial, or otherwise.

Drumbl argues that the application of the liberal paradigm to extraordinary crime is often ill conceived or counterproductive. In part, the application of that paradigm is misguided because the causes and nature of extraordinary crime differ fundamentally from those of ordinary crime: “whereas ordinary crime tends to be deviant in the

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times and places it is committed, the extraordinary acts of individual criminality that collectively lead to mass atrocity are not so deviant in the times and places where they are committed” (p. 8); indeed, they may be “more of a matter of conforming to a social norm” (p. 32). This observation, though it emerges repeatedly in the literature, has been largely ignored in the theory and practice of ICL. The liberal criminal justice paradigm also tends to be imposed exogenously: by the elusive and largely unaccountable international community on actual victimized communities. That paradigm may be not only foreign to the victims, but in tension with indigenous desires, legal traditions, or social norms. Its imposition leads to a uniform, simple, and increasingly homogenized response to the diverse, remarkably complex, and heterogeneous phenomena characterized by mass atrocity.

In short, Drumbl argues, ICL transplants the largely Western penological rationales of liberal criminal law to alien soil. Whether because of professional habit or laziness, the emotive impulse for retributive punishment elicited by extraordinary crime, or the shame of international actors for failing to act when it mattered, ICL tends to insist on a criminal process and substantive penal law developed for a very different context: a reasonably well-ordered polity where crime is the exception (not the rule) and where the apparatus of the state generally enforces (rather than subverts) minimum order. ICL assumes, contrary to some of the available empirical evidence, that incarcerating individuals for fixed terms—the dominant modalities of punishment in national criminal justice systems—will be equally appropriate and effective for collective outbreaks of brutal violence in which the state itself or a cognate collectivity is almost invariably implicated.

Against the homogenization of ICL, Drumbl sets “cosmopolitan pluralism” (p. 20). This alternative approach to retrospective legal responses to mass atrocities would not deny the latter’s universal moral condemnation. It would, however, not only permit, but embrace, diverse, indigenous responses that might better conform to the victims’ wishes and better realize the aspirational goals of ICL. Vertically, he argues, cosmopolitan pluralism would supplant the liberal ICL paradigm with a “qualified” “presumption of deference” to “in situ justice modalities” and “bottom-up approaches to procedure and sanction” (p. 18; emphasis omitted); horizontally, it would “welcome the general regulatory power of law, as well as extralegal interventions, to holistically capture the broad-based complicity that inheres in mass atrocity” (p. 181). Drumbl thereby hopes to spur the development “of a sui generis penology for mass violence” (p. 187).

He argues that ICL’s goals must expand beyond standard penal rationales to respond more holistically to the causes and consequences of mass atrocity. ICL should not reduce complex phenomena such as the Rwandan genocide or atrocities in the former Yugoslavia to a series of discrete, antiseptic, and reductionist—but for that reason, misleading—narratives about individual agency and criminal guilt. While he refrains from embracing collective guilt (because guilt imports criminal liability), he calls for “collective responsibility” (p. 197). In Drumbl’s view, institutions that promote the liberal ICL paradigm of individualized criminal justice need not be abolished. Nor should they be. But they should be augmented and, at times, displaced in order to prioritize local mores, the wishes or needs of the victims, and indigenous, in situ modalities of restorative, reintegrative justice.

I agree with much of Drumbl’s rigorous critique, to which I regrettably cannot do justice given space constraints. It is jejune to assimilate extraordinary crime to ordinary crime and to presume that the inherited modalities of the latter suit the former. The traditional rationales for punishment seem at best questionable and often dubious in the ICL context—although some of Drumbl’s critiques of these rationales, as he to a certain

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extent recognizes, also apply to a greater or lesser degree in the context of national criminal law (more so, in my view, than we generally acknowledge). Still, the tragic, but regrettably not infrequent, phenomenon of extraordinary crime demands that responsible international lawyers and statesmen reflect on the assumptions of the liberal paradigm, including, for example, its exclusive focus on individual agency; the nature and extent of moral choice available to the perpetrators; bystander innocence; and perhaps above all, the relative value of international criminal justice institutions that drain astonishing amounts of all-too-scarce international resources in the service of largely unproven assumptions about their benefits.

Many, myself included, also agree that a uniform response—the liberal ICL paradigm—to contextually diverse crises characterized by mass atrocity is neither practicable nor desirable. Transitional justice scholars have long argued against the universal, exclusive, and acontextual application of that paradigm “as the method to secure . . . universal accountability goals” (p. 19). Alternatives such as truth commissions, hybrid courts, lustration, civil compensation schemes, and perhaps even amnesties may sometimes be the best or the least bad legal response in context.

In the course of his incisive critique of ICL’s assumptions, however, Drumbl at times substitutes equally questionable assumptions about, for example, the primacy of the victims, the virtues of in situ modalities of justice, and the comparative value of ICL’s many avowed goals. Many of these goals prove to be in tension with, or even diametrically opposed to, one another. As José Alvarez has observed:

[O]ur goals are as ambitious as they are contradictory. We aspire to equally affirm the national and the international rule of law; equally protect the rights of victims and defendants; provide equal measures of deterrence, punishment and rehabilitation; avoid scapegoating the few, while not falling into the trap of collective guilt. We want to use the criminal process to convince relevant audiences that this perpetrator is guilty, but also to preserve collective memory. We want the process to satisfy the differing needs of perpetrators, as well as local and international audiences. We want the process to be sensitive to local sensibilities and legal traditions, but also to be consistent with, and contribute to, a growing body of harmonized international crimes and procedures. We want primacy for the goals of the international community, but also want to complement and affirm the national rule of law. And we want to achieve all of this in cases involving ravaged societies, destroyed by violence or poverty (or both) and usually in the midst of international political tensions that preclude or discourage uniform international cooperation, including substantial sums of

reasons, as a practical matter international tribunals “will never be able to try more than a handful of the most egregious cases stemming from any particular conflict.” Laura Dickinson, The Promise of Hybrid Courts, 97 AJIL 295, 303 (2003).
In short, we expect far too much of ICL, and in this regard it is not surprising that the celebratory rhetoric about its capacity to realize these goals often proves hollow. Inevitably, some of its goals must be sacrificed or compromised to achieve others. The appropriate balance, in my view, should depend above all on a contextual appraisal of international and local interests in the wake of any particular episode of mass atrocity.

There is an important distinction here. To say that transitional justice should focus less on punishment of the liberal, ICL variety—and more on local, restorative processes that (perhaps) promote societal rehabilitation and satisfy the victims—may well be plausible in some contexts. Few, for example, would fault post-apartheid South Africa for eschewing ICL in favor of a political compromise, its innovative Truth and Reconciliation Commission, which balanced various goals: not only (some) “punishment” of the guilty, but the creation of a historical record, a measure of catharsis for the victims, and sociopolitical reconciliation. But to say that transitional justice should be more receptive to alternatives to the liberal ICL paradigm is not, strictly, to answer the questions posed at the outset of Atrocity, Punishment, and International Law: “How do we, and how should we, punish someone who commits genocide, crimes against humanity, or discrimination-based war crimes?” (p. xi, emphasis added). It is rather an argument that these questions may be the wrong ones to ask: that what matters may not be penal goals, but other, local and victim-centered objectives. In this view, paradigmatic criminal law inquiries—questions about why, when, and how much we may punish—arise only if, in the first place, some variant of the liberal ICL paradigm would be better or more appropriate for the afflicted local community than would other processes that arguably reflect its authentic cultural and sociopolitical desires.

For certain legal institutions, including property and punishment, H. L. A. Hart famously argued that we should distinguish questions of definition (What is punishment?) from questions of general justifying aim (Why is punishment an appropriate or valuable legal institution?) and from questions of distribution (Who should be punished, how, and how much?). Hart’s distinctions are not gospel; they may well be, as Jeremy Waldron has argued, either overstated or misguided. But for transitional justice writ large, they highlight an important analytic distinction between at least two sets of questions: First, why establish an international criminal justice system at all? Is it, on balance, a good idea—that is, appropriate, legitimate, and effective—to use ICL in the strict sense for any particular circumstance of transitional justice or mass atrocity? Second, assuming that ICL has at least some institutional role to play as a legal response in the aftermath of a given war, genocide, transition from autocratic rule, or other episode characterized by mass atrocity, how do we decide whom to punish or the “right” amount of punishment in particular cases? What factors should be considered to decide the propriety of particular sentences?

The first set of questions—whether and why—implicates comparatively long-standing debates about the relative desirability of ICL in contrast to alternative modes of transitional justice like truth commissions. The second set—whom and how much—has received much less attention in the literature. These latter questions require us to reconsider the hoary philosophical debates about punishment’s rationale within the distinct context of mass atrocity. Drumbl grapples with both of these sets of questions at times but does not always clearly distinguish them. It may well have been misguided, for example, to respond to the Rwandan genocide by establishing an ad hoc international tribunal that exercises primacy under Chapter VII of the UN Charter. Greater deference to Rwanda’s wishes and the needs of the genocide’s victims, including the kind of qualified deference to the in situ traditional legal process known as gacaca that Drumbl commends, may have been

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more appropriate. But it is a distinct question to ask how the International Criminal Tribunal for Rwanda (ICTR)—now that (for better or worse) it exists—should sentence offenders. To put the point in more general terms: what to do in the wake of mass atrocity is a vital question; indeed, doubtless it is a far more vital question than the somewhat absurd, if necessary, exercise of adjudging whether a particular génoçidaire or war criminal should receive twenty-five or thirty-five years in a Swedish prison and why. But it is a very different question from “why do, or should we, punish?” It is related only contingently to inquiries about punishment’s goals, legitimacy, and distribution in particular cases, relative to different perpetrators. It would be helpful to keep these questions analytically distinct; conflating the two, as Drumbl sometimes does, makes it more difficult to answer either.

Insofar as he focuses on “general justifying aim,” Drumbl is surely right that the tension between international and local objectives is more complex than generally acknowledged. It is unwarranted and unreflective to assume, as have some international lawyers, that in situ modalities such as gacaca always represent a distant second-best alternative to ICL. At the same time, Drumbl prudently stresses that he should not be misunderstood as substituting glorification of the local for glorification of the international. He recognizes some of the shortcomings of the latter. But he also tends to give more than qualified deference to in situ justice modalities—more, I think, than experience to date justifies. Although he carefully qualifies his recommendations, his faith in local, indigenous modalities may be as unjustified as the international faith in the liberal criminal justice paradigm that he critiques. He sees local processes as generally more effective and legitimate. Apart from the gacaca experiment, however (the virtues of which he tends, I think, to overstate), he cites few concrete examples of laudable in situ processes for responding to mass atrocity. I remain sceptical, for example, that “mato oput (drinking bitter root herb)” and “nyuo tong gweno (a welcoming ceremony incorporating eggs and twigs)” (p. 144)—cultural traditions of the Acholi people in northern Uganda—will prove to be suitable and genuinely effective modalities of transitional justice for addressing the unconscionable atrocities committed by the Lord’s Resistance Army, even if some Ugandans prefer those modalities to the International Criminal Court. This is not to say, of course, that there might not be other options or that the various options are mutually exclusive.

More fundamentally, I do not see why Drumbl’s incisive critique of transposing the assumptions of national criminal justice systems to the context of mass atrocity does not also apply, mutatis mutandis, to local modalities of “transitional justice.” Gacaca in Rwanda, mato oput and nyuo tong gweno in Uganda, and similar indigenous traditions were no more—indeed, to my knowledge, far less—designed (or evolved) for mass atrocity than were national criminal justice systems. It is not at all clear that such indigenous modalities can be appropriated and redeployed effectively to respond to mass killings, rapes, systematic torture, amputations, and other serious atrocities. Based on a set of thoughtful criteria that he proposes, Drumbl does, in fact, argue that the presumption in favor of qualified deference to local modalities should not apply in certain circumstances. The presumption should not apply, for example, to local prosecutions in Sudan for the atrocities in Darfur; to the pashtunwali in Afghanistan, which often involves the offer of young girls to the wronged party as a form of “restorative justice” for human rights abuses; and to the Iraqi High Tribunal’s trial of Saddam Hussein. But these examples strike me as more the rule than the exception. Qualified deference for in situ modalities of justice will, I fear, tend to look less like a multicultural affirmation of diverse, indigenous traditions and (despite the veneer of legal process) more like the virtual lynching of Saddam Hussein—voyeuristically broadcast throughout the world over the Internet.

Insofar as Atrocity, Punishment, and International Law focuses on ICL punishment, as opposed to transitional justice more broadly, I do not necessarily share the view that local penal norms and the desires of the victims merit priority. Criminal law conceives of crimes as offenses against the polity, to be punished by the polity, for the purpose of...
advancing its paramount social or moral values. It is a hallmark of the criminal law—despite the tragic reality that the victims suffer the immediate, tangible harms—that crime is crime because it threatens fundamental interests or core moral values of a polity. Modern theories of punishment invoke those interests, rather than those of the victims, to justify the deliberate infliction of pain by a political authority. Punishment is not supposed to be about vengeance; even less is it about satisfying the often (understandably) visceral desires of the victims for talionic justice. The real issue is which community or communities count for purposes of penal theory in the context of ICL.

Perhaps it is a mistake to consider the shared values of the figurative international community as the barometer of just punishment in circumstances of mass atrocity. But Drumbl stresses that he accepts the universal moral condemnation of extraordinary crime despite his doubts, which I share, about the rote assimilation of such crime to a social deviance model derived from national law. Yet surely one of the genuine achievements of ICL is the emergence in the twentieth century of a consensus that some crimes, such as genocide, do offend the international community qua community, and not just particular affected polities or victims. These crimes deny or threaten an irreducible minimum of universal human dignity—the concept that animates international human rights law—and, as Theodor Meron argues, the humanization of international law more generally. International law, not just local law, has a distinct interest in punishing mass atrocity, even if the victims turned out to be saints inclined to turn the other cheek after a genocide. Perhaps it also makes less sense to conceive of extraordinary crime as an offense against the local community qua community when that very community is often collectively implicated in the crime (as, for example, in Rwanda). Drumbl’s proposal for “collective responsibility” seems to be based on a broadly similar view.

My own view—and in this regard I share Drumbl’s skepticism—is that current ICL is often institutionally and substantively ill suited to the wishes of the victims of mass atrocity. But I incline toward a different conclusion based on this empirical observation: ICL in the strict sense should not try to be what it is not. It should candidly acknowledge that it serves principally the inclusive interests and shared values of the figurative international community. ICL punishment should be calibrated principally by reference to those interests and values—not by reference to the desires of the victims or of a local polity, which will doubtless vary from one culture or polity to another. To avert misunderstanding, I stress that I do not think that ICL, implemented by international institutions, should be the default legal response to mass atrocity. We should think long and hard, in the first instance, about whether to use ICL as the appropriate “tool” in any particular case, in part because ICL often involves, to a greater or lesser extent, prioritizing international interests and values over those of the literal victims and the afflicted local polity or polities. At times (for example, in transitional societies such as post-apartheid South Africa, some of the former autocracies of Latin America, and some of the former Communist states of eastern Europe), the local polity’s interests, which may or may not include prosecutions, may outweigh the interests ostensibly vindicated or furthered by ICL—but not always. It is now well established that serious violations of international human rights are not “essentially within the domestic jurisdiction of any state.”

Insofar as he focuses on punishment for mass atrocity, Drumbl stresses Arendt’s notion of the “banality of evil” and its characteristically collective nature. Mass atrocity often occurs in a context that inverts the moral and legal structure of society: crime, instead of reflecting deviance from social norms, may become normative, as it did for large segments of the population during the Rwandan genocide. Any morally defensible account of ICL punishment should recognize this fact and rethink the nature and extent of moral choice available to perpetrators of ICL. But we cannot walk too far down this road, for it may lead

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11 See Sloane, supra note 3, at 81.
12 Reisman, supra note 4, at 79.
13 UN Charter Art. 2(7).
to a simplistic form of normative philosophical
determinism captured by the French maxim tout
comprendre, c’est tout pardonner (“to understand all
is to forgive all”); if individual agency is truly a fic-
tion in circumstances of mass atrocity, is it appro-
priate to punish at all?14 Law, as I have argued else-
where, “operates in the realm of normative ethics,
not metaethics.”15

Drumbl recognizes that the concepts of culpa-
bility and choice in circumstances of mass atrocity
raise questions of degree. He stresses that he does
not mean simply to “substitute determinism” for
the general presumption of moral choice sufficient
to underwrite our intuitions about the propriety of
criminal responsibility and punishment. But his
affirmative view remains a bit oblique. He writes,
for example, that he wants to “make more modest
use of Milgram’s findings to argue that collectiv-
ization, diffusion, and conformity whittle down
the scope of individual choice and, accordingly,
create group phenomena based on the primacy of indi-
vidual agency” (p. 31). That may be right, but it is
unclear what practical lessons international crim-
inal lawyers and jurists—those charged with the
actual prosecution and sentencing of war crimi-
nals, génocidaires, and others guilty of extraordi-
nary crimes—should draw from this observation.
Should we ask experts at the sentencing phase of
ICL trials to advise courts on the extent of mitiga-
tion or even exculpation that might be appropriate
for each defendant based on current social, anthro-
pological, and psychological research? Should we
implement a uniform sentence reduction based on
a contextual determination of widespread social
deviance in a polity and the inversion of moral
principles? Drumbl suggests, and I broadly agree,
that “the sociopsychological aspects of individual
agency in collective cataclysm” should be inte-
grated “into the sentencing metric” (p. 207), but
he offers few details on how this recommendation
might be implemented.

The collective, organic nature of extraordinary
crime distinguishes it from most ordinary crime in
national law. Again, however, insofar as the focus
is on punishment, strictly speaking, rather than on
transitional justice writ large, we should distin-
guish several issues. First is the problem of collec-
tive guilt: the extent, if any, to which the collective
nature of mass atrocity should mitigate the indi-
vidual responsibility of each perpetrator in some
proportion to that of the collective.16 A second,
analytically distinct issue is one of social psychology:
the extent, if any, to which prevailing sociopoliti-
cal, cultural, or other conditions during circum-
stances of mass atrocity should mitigate punish-
ment.17 And neither of these issues should be
confused with a third, which is related, but not
identical, to the second: the extent, if any, to which
punishment should be mitigated based on the
defense of following superior orders, which is
more precisely the focus of Milgram’s famous
experiment.

Atrocity, Punishment, and International Law
deserves considerable praise for taking these issues
of potential mitigation seriously despite our intu-
itive revulsion to ICL crimes and the all-too-hu-
man impulse toward simple vengeance or talionic
justice. But the book would have been more effec-
tive if Drumbl had avoided conflating them analy-
tically and had explained more clearly how, in
his view, they should affect particular sentences.
Their relevance to the institution of ICL punish-
ment or particular sentences—or to both—is not
always apparent. Drumbl says, for example, that
“[t]o speak of individual mens rea among the rank-
and-file in such contexts [as the Rwandan geno-
cide] is a bit fanciful. It is unclear whether partici-
pants acted out of the kind of free will that

14 Perhaps it remains appropriate to punish even in
the absence of genuine moral choice, at least from the
perspective of a crude form ofutilitarianism, which con-
ceives of deterrence solely in terms of influencing the
supposed cost-benefit analyses of génocidaires and war
criminals. But Drumbl’s skepticism about ICL’s efi-
cacy in this regard strikes me as in most instances unas-
sailable, even were we to embrace such an impoverished
view of the manifold purposes and limits of punishment.
See HERBERT L. PACKER, THE LIMITS OF THE CRIM-
INAL SANCTION (1968).
15 Sloane, supra note 3, at 62.
16 George Fletcher, The Storrs Lectures: Liberals and
Romantics at War: The Problem of Collective Guilt, 111
YALE L.J. 1499, 1538–39 (2002), appears to espouse
this view.
17 See generally Fletcher & Weinstein, supra note 4.
H. L. A. Hart would determine indispensable to the allocation of criminal guilt” (p. 27, footnote omitted). Even if we agree with Hart’s view on the extent of free will indispensable to the allocation of criminal guilt—a view that is not uncontrover-
sial—I think that this remark confuses matters. We need to distinguish the existence of mens rea from its contextual relevance. The rank-and-file Rwandan génocidaire wielding a machete surely did have a real—not fanciful—individual mens rea: namely, an intent to kill, and by hypothesis, also the specific intent to destroy, in whole or in part, an ethnic, national, racial, or religious group, as such (the Tutsi). The penological question, however, is whether that intent, appraised in light of the contextual factors characteristic of mass atrocity—for example, natural facts about social psychology, the sociopolitical context, the inver-
sion of moral norms within a polity, superior orders, and so forth—warrants as severe a punish-
ment as would be justified based purely on the gravity of the actus reus alone.

None of these remarks detracts from the aca-
demic value of Atrocity, Punishment, and Interna-
tional Law. It is an extensively researched and
deeply thoughtful contribution to the literature, which should be required reading for international criminal lawyers. Drumbl persuasively critiques the predilection for ICL as the default response to mass atrocity; offers cautionary lessons about the limits and dangers of ICL; and provides an original argument for a more pluralistic, cosmopolitan response to mass atrocity that welcomes diverse, in situ justice modalities, subject to prudent qualifi-
cations. I think that he tends to be overly optimis-
tic, however, about those modalities and that the indigenous traditions to which he recommends qualified deference will, in practice, prove more problematic and subject to abuse than he some-
times seems to suppose. Also, reflection on the penological issues raised by ICL in the strict sense will require more precise and methodical analytical distinctions before they can be genuinely helpful to the ICL sentencing process.

In the final analysis, however, Drumbl’s cri-
tique may well suggest the limits of ex post legal responses to mass atrocity generally rather than of ICL in particular. If there is one point on which virtually all would agree, it is that international law should focus more on prophylactic strategies to prevent and forestall mass atrocity in the first place. While ICL represents a moral step forward from the utter neglect of mass atrocity that char-
acterized international law before the latter half of the twentieth century, retrospective accountabil-
ity—whether the liberal ICL paradigm or indige-
 nous in situ processes—remains a woefully inade-
quate and often hypocritical legal response to mass atrocity. The international inertia on the sit-
uation in Darfur, whether technically a genocide or “merely” crimes against humanity and war crimes, is only the latest in a shameful series of international failures to respond to mass atrocity when it genuinely matters the most. So while I remain skeptical of the proposal that ICL, partic-
ularly as understood in the strict sense, should reorient itself to afford qualified deference to in situ processes that focus foremost on the victims, I have no doubt that the real preference of the vic-
tims is not for local, indigenous justice in contrast to international, exogenous justice—nor, for that matter, for anything retrospective; it is for mean-
ful, ex ante international action.

To the extent that ICL—tragically—proves to be the only international legal response to mass atrocity for which states can find the political will and resources, its principal objective (and the one to which, in my judgment, it seems best suited) should be to express the universal moral condem-
nation of extraordinary crimes and, above all, of the political entrepreneurs who orchestrate them. Through the legal institution of punishment car-
rried out in accordance with international due pro-
cess standards, subject to some sociopolitical mar-
gin of appreciation, ICL may also serve to express, reinforce, and promote the normative internaliza-
tion of aspirational moral commitments of the twenty-first century international community itself. Still, ICL is surely, as Drumbl so effectively shows, no solution to the problem of mass atrocity. It may even be counterproductive to the extent that it fosters a sense of comfort at having “done something,” which serves in practice to excuse the

international inability or unwillingness to act *ex ante*. But perhaps in the long term, ICL can contribute to a normative climate sufficient to compel effective international legal responses to prevent or forestall mass atrocity—so that retrospective transitional justice of any sort will be understood as the moral failure it so often reflects.

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In 1991, James Hathaway published a book on refugee law that was to become the leading treatise on the definition of a refugee in international law.1 In his new book, *The Rights of Refugees Under International Law*, Hathaway explores the rights that are owed to persons who meet that definition. The book, one of the most important that has been written on refugee law, is painstakingly researched, cogently argued, and beautifully written. I did find some things with which I disagreed—some of them are addressed in this review—but this is surely also a strength of the book. Hathaway successfully provokes his readers to question and wrestle with his thesis.

*The Rights of Refugees Under International Law* begins (chapter 1) with a detailed discussion of the sources of international law and treaty interpretation. According to Hathaway, progressive developments in international refugee law that render the Refugee Convention2 and its Protocol3 effective in guaranteeing the “widest possible exercise of ... fundamental rights and freedoms” (Refugee Convention, preambular paragraph 2) will not be assisted by customary international law, but by creative arguments concerning the text of the Convention.

Hathaway’s argument that we should focus on a progressive reading of the Convention is lucid and generally persuasive. Although his treatment of customary international law—particularly his focus on what states do rather than what they “say,” and his definition of what states “do” (p. 25)—will be too narrow for some international lawyers,4 most will surely agree with the major thesis of this section of the book: the Refugee Convention should be viewed as a human rights treaty, with the consequence that literalism is an especially inapt approach to its interpretation.

Interestingly, Hathaway argues that the object and purpose of the Refugee Convention is to be found through a perusal of the *travaux préparatoires*. “[A]n interpretation of text made ‘in the light of [the treaty’s] object and purpose’ should take account of the historical intentions of its drafters, yet temper that analysis to ensure the treaty’s effectiveness within its modern social and legal setting” (p. 55). To support this argument, Hathaway argues that the Vienna Convention on the Law of Treaty’s conception of the *travaux* as a “supplementary” means of interpretation simply means that the *travaux* are not to be seen as an autonomous means of interpretation. While much of what is said and quoted in this part of the argument seems eminently sensible, I think that Hathaway understates the potential for the *travaux* to generate confusion, rather than clarity, about the task of treaty interpretation. As stated by Aust, “Travaux must ... always be approached with care. Their investigation is time-consuming, and their usefulness often marginal and very seldom decisive.”5

The dangers of a selective approach to the *travaux* are evident in the U.S. Supreme Court’s decision in *Sale v Haitian Centres Council*,6 as Hathaway has pointed out previously.7 In that case, the

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